

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**MICHIGAN BELL TELEPHONE COMPANY AND
AT&T SERVICES, INC., JOINT EMPLOYERS**

and

**Cases 07–CA–161545
07–CA–165384
07–CA–166130
07–CA–170664
07–CA–176618
07–CA–177201
07–CA–182490
07–CA–184669
07–CA–190631**

**LOCAL 4034, COMMUNICATIONS WORKERS
OF AMERICA (CWA), AFL–CIO**

Steven E. Carlson, Esq., for the General Counsel.
*Stephen J. Sferra and Jeffrey A. Seidle, Esqs. (Littler
Mendelson, P.C.) and John M. Phelan, Esq.*,
for the Respondents.
*Michael L. Fayette, Esq. (Pisky, Smith, Fayette
& Kennedy, LLP)*, for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. On June 21, 2018, I issued a decision in this matter. On July 27, 2020, the Board issued a decision, order, and order remanding.

The Board affirmed my conclusions that the Respondent¹ violated Section 8(a)(3), (5), and (1) of the Act by (A) requiring employee Brian Hooker, a full-time union officer (administrative assistant) since late 2010, to resume performing work as a field technician (working “in the load”) starting on December 13, 2015, and by requiring him to fill out union activity logs; and (B) further violated Section 8(a)(5) and (1) by failing to provide the Union with relevant and necessary information regarding Hooker’s grievance over his return to working in the load and the requirement that he submit union activity logs.

In my decision, I further determined that Hooker’s disciplines and ultimate discharge

¹ The Respondents admitted that they are joint employers and will be referred to herein as the Respondent. See fn. 1 in the Board’s decision.

after he was placed back in the load were the products of that unlawful placement and were based on continued animus. However, the Board remanded to me the allegations pertaining to those disciplines and the discharge,² finding that I should have made “specific findings or resolve conflicting testimony as to the events surrounding each discipline.” 369 NLRB No.124, slip op. at 5 (2020) (fn. omitted). The Board stated:

We find that these specific findings, however, are necessary to decide the issue of whether the Respondent’s disciplining of Hooker was, as the Respondent contends, based on intentional misconduct committed by Hooker rather than his union activity. Therefore, we shall remand to the judge the issue of whether the Respondent unlawfully disciplined and discharged Hooker so that the judge can make the requisite credibility determinations and factual findings. Ibid.

The Board did accept my credibility findings, at footnote 4.

The parties had no way of knowing when they filed their posthearing briefs that the Board would require separate analysis of credibility for each particular incident. Therefore, on July 21, 2020, I issued an order affording the parties an opportunity to file by August 21, 2020, any additional arguments they wished to raise in support of their respective positions on each discipline and the discharge. The General Counsel and the Respondent did so. I have considered their wide-ranging arguments in making the credibility resolutions that the Board has directed. I adhere to my earlier findings of fact and conclusions, which I adopt but will now supplement.

I note that animus is a state of mind. The Board found such animus in the Respondent’s placement of Hooker back in the load and the requirement that he submit union activity logs. In my decision, I concluded that earlier statements by George Mrla, Director of Technical Field Services, demonstrated hostility toward Hooker because of his conduct as the Union’s administrative assistant. Concluding that this animus magically disappeared once Hooker was put back in the load would fly in the face of reason, particularly when Hooker continued his activities as a union official. Therefore, such animus must be carefully considered in determining whether Respondent’s subsequent actions against Hooker were justified, or motivated at least in part by animus.

I further note that finding some disciplines were unlawful would not ipso facto make unlawful all of the disciplines that the Respondent imposed; conversely, finding that the Respondent has rebutted the presumption of unlawful conduct as to some disciplines does not insulate it from the conclusion that it failed to do so as to others. This is consistent with the Board’s remand to consider each discipline on an individual basis and not in the aggregate.

In the interest of avoiding unnecessary redundancy, I will not repeat in full detail all of

² Other than the August 12, 2016 discipline for Hooker’s failure to submit union activity logs, which the Board found violated Sec. 8(a)(5). The Board found it unnecessary to pass on whether this discipline also violated Sec. 8(a)(3).

the factual and credibility findings set out in my original decision, and I will omit many citations contained therein.

Issues

Did the Respondent retaliate against Hooker for his union activities by taking the following adverse actions against him?

- (A) Written warning—March 3, 2016.³
- (B) Suspension—April 27.
- (C) Final written warning/suspension—May 10.
- (D) Final written warning/suspension—May 10.
- (E) Suspension pending discharge—October 10.
- (F) Discharge (“termination”)—October 13.

The complaint also alleges two counselings and one verbal warning on September 6 as violations. However, the General Counsel did not address them in either his original or supplemental briefs. Accordingly, I conclude that the General Counsel is no longer pursuing them. I note that they were similarly not mentioned in the Charging Party’s brief.

Witnesses Relevant to the Remand

The General Counsel called:

- (1) Hooker.
- (2) Local President Ronald Letts.
- (3) Lead Steward and Field Technician (field tech) Cardesian Campbell.

The Respondent called:

- (1) Director Mrla, who had authority over all area managers in his district.
- (2) Area Manager Ted Brash, to whom Managers Andrew Sharp and Jeffrey Osterberg reported.
- (3) Manager Sharp, Hooker’s first-line supervisor since November 2015.
- (4) Manager Osterberg.
- (5) Jody Vilks, asset protection manager.

I will address credibility on an incident-by-incident basis as the Board directed. Conceptually, as opposed to state of mind, determining a witness’ credibility in terms of reliability in averring facts is not an all-or-nothing proposition. As I set out in my original decision, a witness may be partially credible—credible on some matters but not others. See, e.g., *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part 164 F.3d 867 (4th Cir. 1999); *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970).

³ All dates hereinafter occurred in 2016 unless otherwise indicated.

Legal Framework

Employer motivation is analyzed under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient evidence to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus toward the protected conduct (which may be inferred from all of the circumstances), and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, “[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If the employer's proffered defenses are found pretextual, i.e., the reasons given for the employer's actions are either false or were not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

Here, as stated in my original decision, Hooker's union activities, employer knowledge thereof, and the Respondent's adverse actions against him are undisputed. I further found the element of animus. Accordingly, the General Counsel has established a prima facie case of unlawful discrimination as to all of the disciplines, including the discharge. As per the Board's direction, I will address each underlying incident separately in terms determining whether the Respondent has met its burden of rebuttal.

Facts and Conclusions

Expectations for field techs are set out in Respondent's Exhibit 5 (tech expectations), and The Manager's Guide provides for progressive discipline for violations of them (R. Exh. 32 at 10). Brash was the decision maker in all of the disciplines that Hooker received, including the discharge.

The first day that Hooker returned to work in the load as a field tech was December 13, 2015, when he did ride-along training with another technician. From December 20, 2015 through January 28, he had seven additional ride-alongs. His first day working on his own was January 31. I note that the Respondent and the Union had an ongoing dispute over Hooker's placement in the load on December 13 that continued far into 2016. The following is just one example.

Brash scheduled Hooker to work on June 6, but Letts told him that Hooker had union responsibilities and needed to be out of the load for the entire week. Hooker did not report on June 6. On June 10, Hooker prepared a grievance and attended a grievance meeting instead of reporting to the garage at 8 a.m. On July 28, Brash presented Hooker with an attendance counseling and a verbal warning for his unexcused absence on June 6 and a tardiness on June 10.

February 18 Management-Union Meeting

Letts, Brash, and Mrla offered similar testimony. Mrla and Brash recited what they viewed as deficiencies in Hooker's work performance and his noncompliance with turning in union activity logs (or time sheets), amounting to insubordination, work avoidance, and obstruction. The Union expressed disagreement with the Company's characterizations. Mrla asked if Letts condoned Hooker's behavior, and Letts responded that he wished every one of his members was like Hooker. Mrla then stated that he could see he would get no help from the Union, he now knew who Letts was, and there was no reason to continue talking. Mrla abruptly ended the meeting and left.

(A) Written warning—March 3, 2016

This was for violation of tech expectations by misusing time on February 14 and 21, and working overtime without permission on February 11.

Sharp was a more reliable witness than Hooker regarding the circumstances underlying these incidents, to the extent that Sharp had knowledge thereof, and the investigatory interview with Hooker on February 22. In sum, Hooker's accounts were generally not as cogent or consistent.

February 11

On the afternoon of February 11, Hooker was dispatched to a residential job with Training Manager Russ Jordan, who was to train him on the use of a new meter. They had problems getting the meter to work properly and at about 3:50 p.m., Hooker messaged Sharp that he would not be able to finish the job without working overtime (past 4:30 p.m.). Sharp called Hooker on his company cell phone and texted him to let him know that John Root, another tech, would be taking over the job. Hooker did not respond.

Hooker testified that Jordan, "implored me . . . to reconsider my stance about working

overtime, please stay out and work, so that he could show me more features of the meter.”⁴ His testimony was somewhat contradictory about whether he agreed and whether he in fact fixed the problem prior to the time that Root showed up. In any event, the Respondent ended up having to pay both Hooker and Root overtime.

Hooker later explained to Sharp that he had received a new company cell phone and was never given any instructions on how to use it. I credit Sharp that the phone was a simple “flip” phone with a green on and a red off buttons and that he had never given any instructions on its use to any other techs.

As stated, Sharp was a more reliable witness than Hooker to the extent that he had first-hand knowledge. However, upon further consideration, I am troubled by the Respondent’s failure to call Jordan as a witness or to show cause for his absence. Jordan was in a supervisory training role on the scene and would have been in the best position to shed light on what the work entailed, who isolated the problem, who fixed it, and any conversations that he had with Hooker about staying past 4:30 p.m. The discipline was for working overtime without permission, and Jordan could have shed significant light on this issue, irrespective of the company cell phone.

Our system of jurisprudence has what is called the “missing witness rule” that gives a judge discretion to draw an adverse inference based on a party’s failure to call a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s agent and thus within its authority or control. *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 1, citing *Electrical Workers IBEW Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 fn. 1 (1999); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Reno Hilton*, 326 NLRB 1421, 1421 fn. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

Taking this into account, I am not persuaded that the Respondent has rebutted the presumption that this discipline was motivated by unlawful animus. I note that the discipline was issued on March 3, 3 weeks after the date of the incident and about 2 weeks after the February 18 meeting at which there was an acrimonious exchange between Mrla and Letts regarding Hooker’s (unlawful) return to the load. I further note, as the General Counsel points out (GC Supp. Br. 28) that the Respondent produced no evidence that any employee other than Hooker has ever been disciplined for “unauthorized overtime.”

February 14

On February 14, Hooker started his shift at 8 a.m., was not dispatched until 9:30, and then called the duty line at 11:03, saying that there was nothing to do at the worksite.

⁴ Tr. 565.

Hooker testified that the job was of a type on which he had never before worked; that when he arrived, the work appeared to have been completed, but he inspected the work from one end to the other to make certain. However, he further testified that John Haley, a coworker, dropped by between 9:30 and 10 a.m. and that he told Haley that he had no work to do.⁵

Sharp testified that the job was simple one that required no line testing or diagnosis and that Hooker should not have waited until 11:03 to contact him but instead should have closed it out earlier and gotten another dispatch.

Even according to Hooker's version, there was no reason for him to have waited over an hour to call Sharp for another dispatch. Accordingly, I conclude that the Respondent had a legitimate basis for concluding that Hooker misused time on February 14 and has rebutted the presumption of unlawful motivation.

February 21

On Sunday, February 21, Hooker started his shift at 8 a.m. At 9:23, a load balance manager from the dispatch center called Hooker to find out why he had not yet dispatched on a job. Hooker did not answer or return the call. He dispatched on his first job at 9:31.

Hooker testified that he was dispatched at 9:31 through his iPad but before that had gotten the message that no work was available. He offered no other reason for his not going out earlier. However, Sharp testified that on Sundays, three techs worked out of the garage. They reported at 8 a.m., and if they did not have an assignment, they were expected to immediately contact the load balance manager or the duty manager using the fixed duty manager phone number. Hooker admitted that Sharp had told him earlier that if he got such a message on the iPad, he should "SmartChat" with the dispatch center to get work. He also conceded that he had seen Sharp's January 27 email to Sharp's crew, stating that if techs got the message no jobs available, they should call Sharp immediately.⁶

At the February 22 interview, Hooker told Sharp that between 8 a.m. and 9:30, he did not want to do admin work and had to get stock and supplies. Prior to February 21, Hooker had never asked Sharp for more time to get stock or to come in early to get supplies or stock. The warning states that the expectation was for him to dispatch, get any necessary stock, and leave the garage within 20 minutes of his shift.

Hooker's sole reason for waiting until 9:31 to dispatch was that the iPad earlier gave him the message that no work was available. However, he was admittedly aware of other steps that he was supposed to follow to secure a dispatch if he received such a message yet he

⁵ See Hooker's testimony at Tr. 578 that when Haley arrived, he "also had nothing to do on his job."

⁶ I need not address the arguments that Hooker raised in a February 21 email that Sharp's email was asking employees to falsify their daily time reports, or the General Counsel's contention that portions of the email violated the Respondent's tech expectations (GC Supp. Br. 30).

failed to take them. In sum, the Respondent has rebutted the presumption that this warning was issued because of Hooker's protected union activity.

(B) Suspension pending investigation—April 27
(C) Final written warning/3-day suspension—May 10

These related to the intelligent device (IVD) or GPS on Hooker's vehicle that stopped recording on February 28 and April 24. Hooker contended that on February 28, his first day using the truck, he found the GPS on the floor; and that on April 24, he hit the device with his foot while applying the parking brake, and it popped up.

On April 19 (between the two dates in question), Brash reported to the asset protection office that Hooker had tampered with the GPS unit. Vilks, who was assigned to investigate, could recall no other times when she was asked to investigate a nonreporting GPS. She issued her report on May 2 (R. Exh. 41).

On April 19, Brash and Sharp received a form email from Etech Texas, the vendor that serviced the GPS system, regarding GPS nonreporting issues (CP Exh. 2). It stated in relevant part, "Driver usage can sometimes partially dislodge the device, especially when releasing the parking brake." Inexplicably, Brash never provided this email to Vilks. That email also sheds doubt on Brash's testimony that he had never heard of the GPS units getting knocked out or knocked loose when people were setting the parking brake. In fact, Brash later testified that he had received such a form email prior to April 19.

Vilks's notes (R. Exh. 67 at 3) state that Mrla called her on April 19 "to discuss the case" but say nothing about the contents of their conversation, and she testified that she could recall nothing about it. Mrla did not testify thereon.

Campbell was the last driver of the vehicle that Hooker was driving. Both he and Vilks testified that she called him and asked him if he had any problems with the GPS when he had the truck. As I stated in my original decision, Campbell was a credible witness,⁷ and I credit his account as follows. He told her that when he got the vehicle it was brand new and had the new GPS placed in a different position than the old GPS. As a result, it was not reading properly until it was plugged in under the driver's seat. Campbell also told her that after that, he had a couple of incidents when he bumped it, it became loose, and he plugged it back in. I discredit Vilks's testimony that Campbell said that he had no problems with the GPS on the vehicle. In this regard, Vilks's notes failed to mention whatsoever her conversation with Campbell, and she could offer no reason for that puzzling omission.

On April 22, Brash informed Osterberg that there was an open asset investigation against Hooker. He asked Osterberg to observe Hooker and pull his GPS to make sure that it

⁷ I add that the testimony of a respondent's current employees may be considered particularly reliable, in that it is potentially adverse to their own pecuniary interests. *Covanta Bristol, Inc.*, 356 NLRB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745, 758 (1995), aff'd. 83 F.3d 419 (5th Cir. 1996).

was reading.

On April 24, Osterberg, at Brash's direction, drove to the jobsite at which Hooker was working and parked 100 yards away to avoid Hooker's seeing him. He proceeded to record in great detail everything that Hooker did that morning (see R. Exh. 43(a)).

The following factors weigh against the Respondent:

- (1) This was the first time that Vilk was asked to investigate a nonreporting GPS.
- (2) Both the Etech Texas email and Campbell's statements to Vilk arguably supported Hooker's accounts of what occurred with his GPS. Therefore, the failure of Brash to furnish the email to Vilk and Vilk's failure to record her conversation with Campbell must be considered to shed doubt on whether the investigation was bona fide or conducted with a preconceived outcome negative to Hooker.
- (3) The silence of Vilk's notes on what Mrla said when he called her, and her averred inability to recall anything that he said, has to be considered suspicious in light of the antagonism that Mrla had demonstrated toward Hooker for his union activities, described in detail in my original decision. Mrla did not testify about their conversation.
- (4) Vilk's investigation was limited to Hooker's alleged misuse of the GPS, but Brash also instructed Osterberg to observe Hooker to see if he was misusing time. I do not credit Osterberg's testimony that Brash gave him no specific instructions to monitor Hooker beyond the GPS matter and that he, a first-line supervisor, made the decision on his own to observe Hooker's work throughout the morning, minute-by-minute. Indeed, Osterberg was evasive when asked if misuse of time was a secondary purpose for his being directed to observe Hooker that day. Furthermore, Osterberg testified that he had no reason to go to the jobsite to check if Hooker's GPS was reporting because he could have done that in his office through the internet.

These circumstances lead me to conclude that the Respondent's proffered bases for disciplining Hooker for his problems with the GPS were pretextual. Accordingly, the Respondent has failed to rebut the General Counsel's prima case as to them.

(D) Final written warning/3-day suspension—May 10

This was for violation of tech expectations for misusing time on April 10 (claiming that he could not access his tools) and on April 24 when Osterberg observed him.

April 10

Hooker's communications that day were with Duty Manager Sidney Bragg, who was not called as a witness. The following is based on Hooker's uncontroverted and credited testimony. That morning, Hooker called Bragg and said that he did not have the right code to open the padlocks on his truck for access to his truck. Bragg gave Hooker additional instructions. After over an hour, Hooker advised Bragg that the lock was still not working. Bragg ended up coming to the site and opening the lock. Hooker offered unclear testimony

whether he previously had problems opening the locks, and he and Sharp gave conflicting testimony on what the right code was. In any event, Brash issued the discipline because Hooker was late in dispatch on April 10: after initially calling Bragg for the right code, he waited over an hour to tell Bragg that the lock still was not working, and then he did not perform basic work on the ped job to which he had been assigned.

The Respondent did not call Bragg or offer any reason why he could not be present to testify. I previously set out the “missing witness rule.” Bragg would have been in the best position to shed light on what occurred that day and whether or not Hooker’s conduct was reasonable, particularly regarding the length of time he spent trying to implement Bragg’s instructions, and the circumstances surrounding Hooker’s assigned ped job. In the absence of his testimony, I cannot conclude that the Respondent has rebutted the General Counsel’s prima facie case, especially when I have found that the other final written warning/3-day suspension issued the same day (for the GPS violations) violated the Act.

April 24

As earlier noted, Osterberg observed Hooker on April 24, presumably in connection with the GPS investigation. Based on those observations and Hooker’s emails and communications with him, Osterberg concluded that Hooker’s misuse of time that morning included: (1) taking his iPad to a job that did not need it (replacing a ped); (2) “fumbling” in and around his truck; (3) not taking the necessary equipment out to the job; (4) saying that he did not have the necessary safety gloves for working near a potential electrical hazard; (5) claiming that there was a roadblock in digging up the ped; and (6) taking 30 minutes’ excess time for lunch. During Osterberg’s afternoon safety inspection, he reviewed Hooker’s work and determined that no work had been done on the job. Hooker said that he would work to get the ped replaced, but he called Osterberg at the end of his shift, at about 4:26 p.m. and stated that he had replaced the ped but he was returning the BPC because he had not finished the gravel and bonding.

Brash and Sharp met with Hooker and Campbell on May 10 in Sharp’s office. Only Brash testified about this meeting, and I credit his following uncontested testimony. On the April 10 padlock matter, Brash asked why Hooker took an hour after he spoke with the duty manager to tell the duty manager that the code was still not working; Hooker said he had no specific reason but that he had not realized how much time had passed. As to April 24, Brash asked him no questions about the GPS. He produced Osterberg’s timeline reflecting what Osterberg had observed. Brash asked why, when he needed material from another tech, he sat in the garage for 30 minutes instead of going to the worksite and having the tech meet him there (the site was only 5–10 minutes away). Hooker responded that he did not know or consider it but that he was busy looking at prints and job aids.⁸

Brash brought up Hooker’s availability for the load, stating that it was very difficult to get him in to do training. Hooker replied that he had three bosses, and AT&T was only one of

⁸ However, replacing a ped was a straightforward job not requiring the use of prints. Tr. 1465–1466 (Brash).

them. Brash responded that AT&T facilitated his involvement with the others and that he needed to take care of his job. Brash also said that Hooker had turned in only a few union activity logs to date and that he needed to request his time in advance. Hooker replied that many things happened quickly, and he threatened to suspend all stewards and be the only union representative who filed and sat in on grievances. Hooker stated that as per Mrla's conversation with Letts last October, anything between 8 a.m. and 4:30 p.m. Monday through Friday belonged to Letts, and he would show up to work at 4:30 p.m. and work until 6:30 p.m. Brash responded that this was unacceptable.

Regarding the observations of Hooker on April 24, Osterberg's spending hours surreptitiously monitoring Hooker's activities and detailing them minute by minute strikes me as highly unusual behavior and strongly suggests that management was looking to find fault with Hooker's performance. As earlier noted, I have concluded that the GPS investigation, including the monitoring of Hooker's activities on April 24 pertaining to the GPS, was not bona fide.

Significantly, at the May 10 meeting, Brash brought up Hooker's availability for the load and complained about Hooker's failure to submit the union activity logs, and he and Hooker had a heated disagreement over the hours that Hooker was to be available to work. This had nothing to do with the Hooker's conduct on April 10 or 24 and indicates Brash's strong concern with Hooker's use of time for union activities. I note that Hooker had not performed unit work for approximately 5 years and could reasonably have needed more time to become fully proficient.

Based on the above, I conclude that this discipline was pretextual and that the Respondent has therefore failed to rebut the General Counsel's case.

(E) Suspension pending discharge—October 10

(F) Discharge—October 13

The suspension was for violation of tech expectations including time management and violation of company policy on September 20, 21, and 23 and October 3.

The collective-bargaining agreement provides that suspension pending dismissal is required before a discharge. Brash told Chief Steward Charles Johnson on October 10 that he made the decision to discharge Hooker because he did not believe that another suspension would change Hooker's behavior after almost a year of "constant misuse of time, obstruction, work avoidance."⁹

September 20

Hooker's testimony about the chronology of events was confusing and contradictory, and his descriptions of his communications with Sharp were sketchy and lacking in detail.

⁹ Tr. 1648.

Sharp, in contrast, provided a much more detailed account of the day's events, refreshed by his notes of his meeting with Hooker on September 22 (R. Exh. 61), and Campbell corroborated him in part. Accordingly, I credit his testimony and Campbell's more limited testimony as to what occurred and find as follows.

On September 20, Hooker dispatched out at 8:46 a.m. on a job restoring dial tone service. He encountered several roadblocks, one of which was that his iPad was not working correctly, and he was unable to connect to the company's VPN to access Translore to determine to which circuit the customer belonged. Hooker went to the jobsite, where he tested the F1 cable pairs and found a problem, and also tested the F2 cable pairs.

Hooker returned to the garage in the afternoon. Sharp asked what he was doing back. Hooker replied that he needed some safety supplies and a water cooler and that his VPN was not working, and Sharp told him that he should have called or texted him while in the field and then contacted tech support, rather than return to the garage. Hooker returned to the jobsite but called Sharp at 1:18 p.m. and stated that he needed a hut key to access central office (OE) equipment. Sharp told him to come back to the garage and get the key from Campbell. Hooker returned to the garage and stayed for about 40 minutes. Sharp saw him outside talking on the phone and asked to whom he was talking. Hooker replied Letts. Sharp asked what he was still doing there, and he said he had taken his lunch break and talked to Campbell about the job.

Hooker and Campbell went to the jobsite. Hooker explained what he had done and said that he had isolated the F1 cable pair and changed it but still had no dial tone. They worked on it together for a short period. When the end of the shift approached, Hooker called Sharp at about 3:30 p.m. and said that he could not work overtime. Sharp directed Campbell to take over the job, and Hooker returned to the garage. Campbell concluded that the cable pair assigned to Hooker was incorrect, and he changed the pair. There was still no dial tone, and he realized that the trouble was on the OE. Because of the time, no techs were at the central office, and Campbell had to wait for the roving tech to come to the site to make the switch in equipment. As a result, he had to work overtime to finish the job.

September 21

Hooker offered no testimony about the day's events, the General Counsel relying on documentary evidence (GC Exhs. 78–80), and I credit Sharp's un rebutted account of what took place beyond those documents.

Hooker's shift started at 8 a.m., and he received a dispatch at 8:53 on a telephone service repair job. However, he did not leave the garage until 10:13. That morning, while Hooker was still in the garage, he had various communications with Sharp: (1) at 8:21, he texted Sharp that his VPN was again switching itself off; at 8:52, he sent Sharp another text, stating that his VPN did connect but he still could not get into the LTE app. He also brought up another roadblock—that the automobile charger for his iPad was missing. He explained that he had enough battery life left to pick up a job but needed it to be charged; (2) at 9:35,

he texted Sharp that severe weather was hampering his morning start.¹⁰ He also stated that he had been unsuccessful finding a charging cord for his iPad, that he had not heard back from Sharp, and that he would continue to look for one in the garage until it was safe to leave. Hooker actually left the garage shortly thereafter; (3) at 10:11, he sent Sharp another email, stating that he had found his charger shoved down between the metal box and power inventor because someone else must have shoved it there when using his truck. He also said that he was reporting a work injury that he had received while retrieving the cord. Hooker further said that as to Sharp's instruction to "go to work," he could not get on the network yet because the last lightning strike was .4 miles from him within the last 30 minutes.

Sharp responded by calling Hooker and asked about his injury. Hooker responded that he had hurt his hand, and Sharp asked if he needed to go to Concentra, the Company's medical center. Hooker replied no, it was just a scrape, but that he would monitor it.

Hooker left the garage at 10:13 a.m. but returned at 2:45 p.m. He called Sharp and stated that his hand was getting worse, and he thought it needed medical attention. Sharp told him to go to Concentra. Thereafter, Sharp reassigned the job to another employee, who finished it in 45 minutes to an hour by replacing a defective F1 pair.

September 22 and October 5 Interviews

On September 22, Sharp interviewed Hooker about his conduct on September 20 and 21 because he believed that Hooker had misused time on both days. Campbell and Manager Dean Miller were also present. Hooker did not testify about what was said at the interview; Sharp relied primarily on his notes (R. Exh. 62), which were not necessarily inconsistent with Campbell's testimony. I find the following.

As to September 20, I credit Campbell's un rebutted testimony that he stated it was easy to assume (as Hooker had) that the F1 was bad rather than the OE because problems with OE were less common, resulting in a misdiagnosis. Sharp did not relate to Brash what Campbell said at the meeting. Campbell opined at trial that Hooker had isolated the trouble fairly well aside from the OE issue and that the misdiagnosis was an easy oversight for someone who had not been in the field very long. It is unclear whether he actually stated this at the interview.

Regarding September 21, Hooker explained the work that he had done at the jobsite, including working on the F2. Sharp testified that this made no sense because Hooker said the F2 tested clean and the trouble was in the F1.

On October 5, at Brash's direction, Sharp had a second interview with Hooker concerning Hooker's activities on September 21. Campbell and Miller were again also present. Only Sharp testified about the meeting, and he once more relied on his notes (R. Exh. 63) for refreshment. He concluded that Hooker provided no new information. Brash

¹⁰ However, no other techs experienced a delay in leaving the garage due to weather conditions that morning.

concurred with Sharp that Hooker had misused time on both days, including misrepresenting the work he performed on September 20. However, Sharp testified that he never accused Hooker of lying.

5 As to the events of September 20 and 21, Hooker offered unsatisfactory testimony on the first and no testimony on the second. The number of problems that he reported experiencing on both dates strikes me as quite extraordinary and beyond the realm of normal. Crediting him that he had all those problems, I have to doubt whether he in fact was diligent in trying to expeditiously resolve them.¹¹ Accordingly, I conclude that the Respondent had
10 good cause to believe that he was misusing time and therefore has rebutted the General Counsel's prima facie case on these actions.

September 23 and October 3

15 The conduct concerned paid training hours for which Hooker put in. Brash was the only witness who testified on this, and I credit his account. All technicians have required monthly trainings or courses that they take on the mLearning application (the app) on their iPads, and Hooker had required trainings due for August and September on three subjects. As per the app, the total estimated course length for all three was 1-1/2 hours. As of the week of
20 September 19, Hooker had not completed them. Sharp provided him paid time on September 23 to do so, and Hooker reported 2.75 hours for training on his timecard. He completed no training that day.

25 On October 3, Sharp provided Hooker further training time. Hooker reported 3 hours for training but completed no courses that day. However, the following day, he did complete them, as well as two other courses, when at the union hall on union-paid time.

30 Brash conceded that if a tech leaves the app open on his/her iPad, accrued time continues to be recorded even if the tech is not actually taking the training. If the tech goes into the app on more than one day, time accumulates. However, the tech enters the training time on his time sheet regardless of the hours showing on the app.

35 Brash testified that Hooker had billed the Company for 5.75 hours of training whereas they should have taken less than 2 hours. He rejected Hooker's explanation that VPN issues and interruptions by coworkers had delayed him.

40 No first-line supervisors or employees testified from first-hand knowledge about general practices and procedures concerning use of the app and reporting training time. I am therefore unable to decide whether Hooker's conduct was within or beyond the norm and cannot evaluate the validity of the Respondent's contention that Hooker violated company policy by misusing time. The Respondent provided no evidence that any other employees have ever been disciplined for misusing time connected to training. Therefore, the Respondent has not met its burden of rebutting the General Counsel's prima facie case.

¹¹ Even leaving aside the cable diagnosis situation on September 20, for which Hooker was not culpable (Campbell's credited testimony).

Summary

Hooker's relationship as a union official with management was fraught with animosity prior to his unlawful placement in the load on December 13, 2015, with management perceiving as unreasonable his conduct as the Union's administrative assistant. Thereafter, Mrla and Brash repeatedly clashed with Letts and Hooker far into 2016 concerning how Hooker would apportion his time between union activity and tech work. Moreover, Hooker and management continued to be at odds over his conduct as a union official. Early on, management concluded that Hooker deliberately engaged in behavior that impeded his ability to resume performance of unit work, and Hooker expressed resentment at being placed back in the load. My original decision sets out all the facts that support these conclusions. I am not an arbitrator, and apportioning blame for all of the issues that arose between the parties is beyond my purview.

I conclude the following:

These disciplines violated Section 8(a)(3) and (1) of the Act:

- (A) March 3 written warning (as to February 11).
 - (B) April 27 suspension.
 - (C) May 10 final written warning/suspension (GPS).
 - (D) May 10 final written warning/suspension (misuse of time).
 - (E) October 10 suspension pending discharge (as to September 23 and October 5).
- These disciplines did not violate the Act:

- (A) March 3 written warning (as to February 14 and 21).
- (B) October 10 suspension pending discharge (as to September 20 and 21).

The Respondent represents (R. Br. 139 fn. 35, fn. 36; R. Supp. Br. 20) that Hooker was discharged under its progressive discipline policy only for misuse of time in the incidents underlying: (1) the March 3 written warning; (2) the May 10 final written warning and 3-day suspension; and (3) the October 10 suspension pending discharge. I am not convinced that Brash did not also consider the other disciplines, including the April 27 suspension and the May 10 final written warning/ suspension relating to the GPS. Thus, Brash testified that on October 10, he told the chief steward that he did not think another suspension would change Hooker's behavior of almost a year of constant misuse of time, obstruction, and work avoidance. This strongly suggests that the discharge was based on the cumulative disciplines that Hooker had received, not only those for misuse of time. This conclusion is buttressed by the fact that, as reflected in my original decision, the record is replete with statements that Brash made showing his belief that Hooker from the start took ongoing steps to resist performing assigned unit work, including but not limited to misuse of time.

In any event, I have found unlawful the March 3 warning and the May 10 written warning/suspension for misuse of time. I therefore must conclude that the October 13 discharge was improperly motivated in part and thus illegal. As the Board stated in *Hays Corp.*, 334 NLRB 48, 50 (2001), "It is well settled that, where a respondent disciplines an employee based on prior

discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful,” citing *Jennise-O-Foods, Inc.*, 301NLRB 305, 319 (1991); *Asociacion Hospital del Maestro*, 283 NLRB 419, 425 (1987), enfd. 842 F.2d 575 (1st Cir. 1988).

It follows that Hooker was not discharged “for cause” within the meaning of Section 10(c) of the Act, and the Respondent’s argument (R. Br. 61; R. Supp. Br. 39–41) that Hooker is barred from relief under that section fails. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964); *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 fn. 61 (2018); *Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 7–8 (2017).

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing certain disciplines to Hooker, culminating in his discharge, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

REMEDY

Because I have found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily discharged Brian Hooker, must make him whole for any losses of earnings and other benefits suffered as a result of his discharge. A make-whole remedy is appropriate because a remedy should “restore as nearly as possible the situation that would have prevailed but for the unfair labor practices.” *E.I. DuPont*, 362 NLRB No. 98, slip op. at 7 (2015), quoting *State Distributing Co.*, 282 NLRB 1048, 1048 (1987).

Specifically, the Respondents shall make Brian Hooker whole for any losses, earnings, and other benefits that he suffered as a result of his unlawful discharge. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondents shall compensate Brian Hooker for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondents shall compensate Brian Hooker for the adverse tax consequences, if

any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondents shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 7 a report allocating backpay to the appropriate calendar year for Brian Hooker. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondents having discriminatorily discharged Brian Hooker must also offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

The Respondents shall expunge from their records any and all references to the disciplines that I have found unlawful and the discharge of Brian Hooker.

The Respondents shall post a notice to employees as set out below.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondents, Michigan Bell Telephone Company, and AT&T Services, Inc., Joint Employers, Grand Rapids, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against union officials because they engage in activities on behalf of Local 4034, Communications Workers of America (CWA), AFL-CIO (the Union).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Brian Hooker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Brian Hooker whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from their files any reference to the unlawful disciplines and discharge of Brian Hooker, and within 3 days thereafter notify him in writing that this has been done and that those disciplines and the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their facilities in Grand Rapids, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 3, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

I FURTHER ORDER that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 8, 2020



Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

Local 4034, Communications Workers of America (CWA), AFL-CIO is the collective-bargaining representative of certain of our employees, including field technicians.

WE WILL NOT discipline, discharge, or otherwise discriminate against your union representatives because they have engaged in union activities on your behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Brian Hooker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Brian Hooker whole for any loss of earnings and other benefits he suffered as a result of our discrimination, with interest.

WE WILL remove from our files any references to Brian Hooker's unlawful disciplines and discharge, and we will, within 3 days thereafter notify him in writing that this has been done and that those disciplines and discharge will not be used against him in any way.

MICHIGAN BELL TELEPHONE COMPANY,
AND AT&T SERVICES, INC., JOINT
EMPLOYERS

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/07-CA-161545 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY
ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165.